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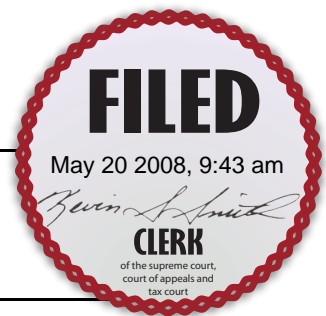
APPELLANT PRO SE:

**CHARLES GARRIDO, JR.**  
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

**JEFFREY E. RAMSEY**  
Hopper Blackwell, P.C.  
Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**



CHARLES GARRIDO, JR.,

Appellant,

VS.

KEY BANK, N.A.,

Appellee.

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No. 49A04-0710-CV-581

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Gregory A. Neibarger, Judge Pro Tempore  
Cause No. 49D05-0506-CC-23164

**May 20, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Charles Garrido appeals the trial court's grant of summary judgment in favor of Key Bank, N.A. We reverse and remand.

## **Issue**

The sole restated issue is whether a release Garrido signed after termination of his employment with McDonald Investments, Inc., absolved him of liability for a Key Bank promissory note that he co-signed.

## **Facts**

On April 4, 1997, Garrido was an employee of McDonald Investments. On that date, he co-signed an unsecured \$50,000 promissory note issued by Key Bank. The intended primary borrower of the funds was Paul Thomas, a McDonald Investments employee who worked under Garrido. The purpose of the loan was to finance personal investments by Thomas. Thomas would not have been able to obtain the loan without Garrido's co-signature. In July 1998, Key Bank renewed the promissory note. An internal Key Bank memo recommending renewal of the note stated in part, "Charles is the strength of this transaction. Charles continues to be a strong referral source for the Bank." App. p. 84. Key Bank continued renewing the note annually through 2003.

McDonald Investments and Key Bank both are wholly-owned subsidiaries of Key Corporation ("Key Corp").<sup>1</sup> Key Bank contends that it and McDonald Investments are legally distinct entities. Key Bank and McDonald Investments both operate under the

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<sup>1</sup> The designated summary judgment materials refer directly only to Key Bank being a subsidiary of Key Corp. In its appellate brief, Key Bank states that McDonald Investments also is a subsidiary of Key Corp.

trade name McDonald Financial Group. Within this group, Key Bank provides general banking services to customers and McDonald Investments provides investment services; Key Bank refers its banking customers to McDonald Investments for investment services and McDonald Investments refers its investment customers to Key Bank for banking services. McDonald Investments also sometimes used the trade name Key Capital Partners. Key Bank also acted as agent for processing payroll for McDonald Investments employees, though using only McDonald Investments funds.

Garrido states that he “and other McDonald legacy employees had been informed that we were Key Bank employees first and foremost, with McDonald Financial Group serving as a line of business within Key Bank.” Id. at 71. He was a McDonald Investments branch manager, and his performance in that position was in part assessed on his ability to refer customers to Key Bank for loans and checking accounts. He reported to David Doll, Regional Director for the McDonald Financial Group, and David Lyons, President of Indiana Key Bank.

On January 20, 2004, McDonald Investments terminated Garrido’s employment. A Key Bank human resources manager informed Garrido of his termination. On August 2, 2004, Garrido received a letter from Kevin McCurdy regarding non-payment on the promissory note. McCurdy is identified in the letter as “Financial Advisor” of McDonald Financial Group and Vice President of Key Bank. Id. at 74. On the top left hand side of the letterhead is the name McDonald Financial Group, with a picture of a key under it. On the top right hand side of the letterhead is named McDonald Investments and Key Bank, with a single address, phone number, and fax number for both entities.

On May 11, 2005, Garrido executed a “Settlement Agreement and Release” with McDonald Investments. Id. at 58. Signing on behalf of McDonald Investments was William Caster, identified simply as “Regional Director.” Id. at 64. Garrido asserts that Caster was Regional Director of the Community Banking Arm of Key Corp. The release stated that it was between Garrido “and MCDONALD INVESTMENTS INC., for the benefit of its officers, directors, employees, agents, predecessors, successors, and assigns (collectively ‘McDonald’), on the other hand.” Id. at 58. Garrido paid \$20,000 as consideration for the release.

The release specifically referred to McDonald Investments’ National Association of Securities Dealers (“NASD”) arbitration action against Garrido to collect over \$100,000 on a loan it had made Garrido, and Garrido’s counterclaim in the NASD action and Equal Employment Opportunity Commission claims of discrimination and retaliatory discharge. The release language encompassed more than these particular claims, however. With respect to releasing Garrido, the agreement stated:

Except as expressly stated below, McDonald hereby releases Garrido from any and all claims, actions, causes of action, damages, controversies and disputes, from the beginning of the world to the date hereof, whether known or unknown and which arise out of, or which may, can, or shall arise out of, or which have or ever have arisen out of, or which could have arisen out of, the employment and/or termination of Garrido’s employment with McDonald including, without limitation, any and all claims for contribution or indemnity related to the judgment in NASD Arbitration No. 04-00385 . . . , any and all claims for contribution or indemnity related to Keith Slifer and Margaret Slifer, claims for breach of contract and any other claims, counterclaims and/or third-party claims, which have been, or

could have been, asserted against Garrido in any court, arbitration, or other forum.

McDonald represents that Key Capital Partners is a trade name used by a line of business. McDonald agrees that this release relates to any claim that could have been made by it using the trade name Key Capital Partners.

With the exception of NASD Case No. 04-00385, this release . . . does not apply to any past, current or future allegations made by customers, regulatory matters, or to claims initiated by any third parties.

Id. at 60-61.

On June 16, 2005, Key Bank filed a complaint against Garrido and Thomas to recover the remaining principal on the promissory note, \$47,018.78, plus interest. On December 5, 2006, Key Bank filed a motion for summary judgment against Garrido and Thomas. Garrido responded by asserting that the McDonald Investments release also released him from liability on the Key Bank promissory note. On September 19, 2007, the trial court entered summary judgment in favor of Key Bank and against Garrido and Thomas. Garrido only now appeals.

### **Analysis**

Summary judgment is appropriate only if the designated evidence demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Indiana Trial Rule 56(C); Liggett v. Young, 877 N.E.2d 178, 180-81 (Ind. 2007). We construe all facts and reasonable inferences therefrom in favor of the non-moving party. Liggett, 877 N.E.2d at 181. We must carefully review summary judgment decisions to ensure a party is not improperly denied his or her day in court. Id.

We are asked here to interpret a release provision. A release agreement is a species of contract that surrenders a claimant's right to prosecute a cause of action. Dick Corp. v. Geiger, 783 N.E.2d 368, 374 (Ind. Ct. App. 2003), trans. denied. Upholding releases serves an important public policy by facilitating the orderly settlement of disputes. Id. "Interpretation of a release, like any other contract, is determined by the terms of the particular instrument, considered in light of all facts and circumstances." Id. Unambiguous release provisions are interpreted as a matter of law, and we look only to the instrument to ascertain the parties' intent. Id. The paramount goal when interpreting release agreements is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of the agreement. Id. at 375.

The release agreement here on its face is unambiguous. McDonald Investments released Garrido from all claims it might have against him. Key Bank filed a lawsuit against Garrido, and the question we are tasked with answering is whether there are questions of fact regarding the ability of Key Bank to file such a lawsuit given its close affiliation with McDonald Investments. We answer that question in the affirmative and believe there are sufficient questions of fact regarding application of the terms of the release to this specific set of circumstances such that summary judgment was inappropriate.<sup>2</sup>

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<sup>2</sup> It might be said that the release suffered from a latent, but not a patent, ambiguity. Patent ambiguity is apparent on the face of the instrument and arises from indefinite or confusing language in the instrument. Simon Property Group, L.P. v. Michigan Sporting Goods Distributors, Inc., 837 N.E.2d 1058, 1070-71 (Ind. Ct. App. 2005), trans. denied. Latent ambiguity is not apparent until it comes time to implement the contract, as was the case here. See id. at 1071. It used to be clear that extrinsic evidence was not admissible to explain a patent ambiguity, but was admissible to explain a latent ambiguity. Id. Our

Specifically, when viewing the designated evidence in a light most favorable to Garrido, there is considerable corporate overlap between Key Bank and McDonald Investments. Both are wholly-owned subsidiaries of Key Corp. Both operate symbiotically under the Key Corp umbrella line of business known as McDonald Financial Group, for the express purpose of referring customers to each other to provide different financial services. McDonald Investments employees were told to consider themselves Key Bank employees. The two companies shared letterhead, and as indicated by that letterhead, also shared an address, phone number, and fax number. McDonald Investments sometimes used the trade name Key Capital Partners, thus benefiting from its association with Key Bank and Key Corp. Garrido's job performance as a McDonald Investments manager was evaluated in part on the basis of his ability to refer customers to Key Bank. Garrido reported to Key Bank employees. Some employees of Key Bank held concurrent roles with McDonald Financial Group. Key Bank processed payroll for McDonald Investments. A Key Bank human resources manager informed Garrido of his termination.

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supreme court recently discarded the distinction between patent and latent ambiguities in the context of wills and trusts and held that extrinsic evidence always was admissible in resolving an ambiguity of any kind. See University of Southern Indiana Foundation v. Baker, 843 N.E.2d 528, 535 (Ind. 2006). The court did not expressly state whether that holding applied not only to wills and trusts, but also to contracts and other written instruments. This court has applied Baker's holding in the context of other instruments. See Shorter v. Shorter, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006) (citing Baker in holding that extrinsic evidence was admissible to explain any ambiguity in a dissolution settlement agreement); Drees Co., Inc. v. Thompson, 868 N.E.2d 32, 39 n.1 (Ind. Ct. App. 2007) (stating, "it would logically follow that the abrogation of the patent/latent distinction would also apply in the construction of easements."), trans. denied. In either case, whether or not we adhere to the latent/patent distinction, we conclude it is appropriate to consider extrinsic evidence in resolving whether it was intended that the release applied to Key Bank.

It may be, as Key Bank insists, that Key Bank and McDonald Investments are separate corporate entities in a strict legal sense. Still, the release at issue applied not only to McDonald Investments, but also to McDonald Investments’s “officers, directors, employees, agents, predecessors, successors, and assigns (collectively ‘McDonald’) . . . .” App. at 58. We believe there is an ambiguity and question of fact that must be resolved outside of summary judgment as to whether Key Bank was intended to fall under any of these categories, particularly as an “agent” of McDonald Investments.

We also note that courts may disregard the separateness of corporate entities in order to prevent unfairness to third parties. See Smith v. McLeod Distrib., Inc., 744 N.E.2d 459, 462 (Ind. Ct. App. 2000). The fiction of a separate corporate entity may be disregarded where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation. Id. “‘Indiana courts refuse to recognize corporations as separate entities where the facts establish several corporations are acting as the same entity.’” Id. (quoting General Finance Corp. v. Skinner, 426 N.E.2d 77, 84 (Ind. Ct. App. 1981)). Factors to consider in deciding whether two or more affiliated corporations should be treated as a single entity include whether similar corporate names are used; whether there were common principal corporate officers, directors, and employees; whether the business purposes of the corporations were similar; and whether the corporations were located in the same offices



and used the same telephone numbers and business cards.<sup>3</sup> Id. at 463. Courts may also consider the intermingling of business transactions, functions, property, employees, funds, records, and corporate names in dealing with the public. Id.

Key Bank also argues that the promissory note at issue here did not “arise out of” Garrido’s employment, so the release cannot apply to that note. App. p. 60. We conclude there is a question of fact on that point. In viewing the designated evidence in a light most favorable to Garrido, it would be reasonable to infer that Key Bank was more willing to issue the promissory note with Garrido as co-signer because of his employment by McDonald Investments and his close affiliation with Key Bank. Indeed, the note was renewed in 1998 in part because “Charles continues to be a strong referral source for the Bank.” Id. at 84. This arguably goes beyond Key Bank merely offering credit to a creditworthy individual, but instead indicates that Garrido was offered “special treatment” because of his affiliation with Key Bank through his employment by McDonald Investments.

Where a release is ambiguous with respect to its scope and the intent of the parties, summary judgment is improper. See Dick Corp., 783 N.E.2d at 374; see also Depew v. Burkle, 786 N.E.2d 1144, 1150 (Ind. Ct. App. 2003), trans. denied. This release is ambiguous, at least as to whether it applies to the promissory note at issue here. Specifically, given the considerable interconnectedness between Key Bank and

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<sup>3</sup> The analysis of whether the separateness of two corporations should be disregarded is different from an analysis of whether the corporate veil should be pierced to hold corporate directors, shareholders, or officers personally liable for a corporate debt. See Smith, 744 N.E.2d at 463 (discussing Aronson v. Price, 644 N.E.2d 864, 867 (Ind. 1994)).

McDonald Investments there is a question of fact as to whether the release applied to Key Bank as well as McDonald Investments. Also, there is a question of fact as to whether the issuance of the promissory note arose out of Garrido's employment. The granting of summary judgment in this case was premature.

### **Conclusion**

Genuine issues of material fact exist with respect to the intended scope of the release Garrido executed. We reverse the grant of summary judgment in favor of Key Bank and remand for further proceedings consistent with this opinion.

Reversed and remanded.

CRONE, J., and BRADFORD, J., concur.